

**UNITED STATES DISTRICT COURT  
DISTRICT OF NEVADA**

THOMAS SORIA,

3:09-cv-00762-RCJ-VPC

V.

**REPORT AND RECOMMENDATION**  
**OF U.S. MAGISTRATE JUDGE**

NEVADA DEPARTMENT  
OF CORRECTIONS, *et al.*,

February 7, 2012

## Defendants.

This Report and Recommendation is made to the Honorable Robert C. Jones, Chief United States District Judge. The action was referred to the undersigned Magistrate Judge pursuant to 28 U.S.C. § 636(b)(1)(B) and LR IB 1-4. Before the court is defendants' motion for summary judgment (#26).<sup>1</sup> Plaintiff opposed (#50) and defendants did not reply.<sup>2</sup> The court has thoroughly reviewed the record and recommends that defendants' motion for summary judgment (#26) be granted.

## I. HISTORY & PROCEDURAL BACKGROUND

Plaintiff Thomas Soria (“plaintiff”), a *pro se* inmate, is currently incarcerated at Lovelock Correctional Center (“LCC”) in the custody of the Nevada Department of Corrections (“NDOC”) (#1-2). Plaintiff originally filed his civil rights complaint in the Sixth Judicial District Court of the State of Nevada and defendants removed to federal court on December 31, 2009 (#1). In his complaint, plaintiff alleges that defendants violated his rights to free exercise of religion and to equal protection under the law (#1-2). Pursuant to 28 U.S.C. § 1915A, the court screened plaintiff’s complaint and plaintiff’s remaining claims allege violations of the First Amendment, Fourteenth Amendment, and Religious Land Use and Institutionalized Persons Act (“RLUIPA”) against NDOC Director Howard Skolnik, former LCC Warden Jack Palmer, and former NDOC Deputy Director

<sup>1</sup> Refers to the court's docket numbers.

2 Defendants moved to strike plaintiff's opposition as untimely; however, the court denied  
28 defendants' motion to strike in a minute order (#60).

1 Don Helling (#12).<sup>3</sup> Skolnik, Palmer, and Helling (“defendants”) bring the instant motion (#26).

2 Counts I, II, and III of plaintiff’s complaint arise out of the following undisputed facts  
 3 according to plaintiff’s complaint (#1-2)<sup>4</sup> and defendants’ motion for summary judgment (#26).  
 4 Plaintiff submitted an inmate request form on April 26, 2009, and requested approval for a sukkah  
 5 booth to use during the Sukkot festival (#1-2, p. 19; #26-1, Ex. A).<sup>5</sup> LCC chaplain Richard Garcia  
 6 responded and stated: “While the Wardens approved receipt and use of a sukkah booth, Rabbi Katy  
 7 of Aleph [Institute] notified me that Aleph does not have the funds currently to provide one.” *Id.*

8 On May 11, 2009, plaintiff requested that LCC find another source to donate a sukkah booth  
 9 or “the materials to build one” (#1-2, p. 20). Chaplain Garcia responded and said that plaintiff  
 10 should have the Jewish group facilitator speak with Chaplain Garcia about the matter. *Id.* In June  
 11 2009, plaintiff requested that LCC provide him with a plot of outdoor land on which to place a  
 12 sukkah booth. *Id.* at 21. Chaplain Garcia responded that “it is difficult to determine at this time –  
 13 without actually seeing a sukkot [sic] booth – where it should be erected. A determination will be  
 14 made when it actually arrives here.” *Id.* On August 16, 2009, plaintiff filed an inmate request form  
 15 and asked LCC to purchase materials so that he could build a sukkah booth or “get a premade [sic]  
 16 booth from another source, if necessary expending funds” (#1-2, p. 29). LCC responded that  
 17 plaintiff had access to the chapel and that the prison did not have funds to purchase a booth. *Id.*  
 18 Despite NDOC’s approval of the sukkah booth, plaintiff did not purchase or obtain a sukkah booth  
 19 prior to the 2009 festival (#1-2, p. 21). On November 11, 2009, plaintiff filed his civil rights  
 20 complaint (#1-2).<sup>6</sup>

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22 <sup>3</sup> Plaintiff also named NDOC as a defendant, but the court dismissed the claims against NDOC  
 23 upon screening the complaint pursuant to 28 U.S.C. § 1915A (#12).

24 <sup>4</sup> When citing to the parties’ filings, the court utilizes the page numbers produced by the  
 25 electronic docketing system, at the top of the page.

26 <sup>5</sup> Sukkot is an eight-day Jewish festival celebrated in September or October of each year, in  
 27 which Jewish practitioners eat and pray inside a sukkah booth which is placed outdoors (#26-1, Ex. A, p.1;  
 28 #50, pp. 42-43).

29 <sup>6</sup> The court understands that a change of circumstances occurred following the filing of  
 30 plaintiff’s complaint. However, the court only considers the facts alleged in plaintiff’s complaint.  
 31 Defendants did not consent to litigation of issues outside the original pleadings and plaintiff did not amend

1 Plaintiff alleges defendants violated his First Amendment right to free exercise of religion,  
 2 his right to religious exercise under RLUIPA, and his Fourteenth Amendment right to equal  
 3 protection when they did not provide an outdoor area for a sukkah booth, “affording funds, or  
 4 donations, or materials” for a sukkah booth (#1-2, p. 13). Plaintiff alleges that defendants allowed  
 5 Native American and Pagan groups to use the outdoor grounds and assigned plots of land for their  
 6 religious use (#1-2, p. 13).<sup>7</sup> Plaintiff claims that defendants made expenditures for other non-Jewish  
 7 prisoners to engage in religious activity, but failed to do so for plaintiff. *Id.* Plaintiff requests  
 8 injunctive relief “commanding defendants, their agents, to alter and modify their customs, practices,  
 9 policies and otherwise that they afford and provide sukkot and a sukkot [sic] booth.” *Id.* at 16.  
 10 Plaintiff also requests recovery of costs of this litigation, declaratory, and compensatory relief. *Id.*

11 Defendants move for summary judgment on plaintiff’s claims regarding his exercise of  
 12 religion and argue they did not burden plaintiff’s practice of religion because LCC approved  
 13 plaintiff’s request for a sukkah booth and use of outdoors grounds (#26). Defendants assert that  
 14 defendant Skolnik was not personally involved in the alleged violations of the First Amendment and  
 15 RLUIPA. *Id.* at 17. Regarding plaintiff’s equal protection claim, defendants contend that plaintiff  
 16 offers no evidence of discriminatory intent with regard to NDOC’s practice of assigning outdoor  
 17 grounds to religions which have historically and traditionally met outdoors. *Id.* at 19-20. Moreover,  
 18 defendants state that they do not purchase religious property for inmates of any faith group. *Id.* at  
 19 20-21. Defendants argue they cannot be sued under section 1983 in their official capacities for  
 20 damages and cannot be sued in their individual capacities for damages under RLUIPA. *Id.* at 21-23.

21 Plaintiff opposes and argues that defendants’ “approval [of a sukkah booth] was ultimately  
 22 a denial as they and/or their agents knew full well that purchase was impossible for the plaintiff or  
 23 Jewish community” (#50, p. 8). Plaintiff discusses several possible ways that LCC could safely  
 24 allow the use of a sukkah booth. *Id.* at 9. However, plaintiff misunderstands which facts the court  
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26 his complaint. *See* Fed.R.Civ.P. 15.

27 <sup>7</sup> NDOC Administrative Regulation (“AR”) 810.4 classifies Judaism as a “chapel-based”  
 28 religion because Jewish practitioners historically use a building for group worship (#26-1, Ex. E, p. 35). The  
 AR classifies faith groups such as Native Americans and Pagans as “earth-based” religions. *Id.*

1 will consider in evaluating a motion for summary judgment. Plaintiff focuses on events which  
2 occurred after the filing of his complaint.<sup>8</sup> The court only considers the claims alleged in plaintiff's  
3 complaint. Plaintiff also argues that defendant Skolnik was personally involved in the alleged  
4 violations because he promulgated AR 810. *Id.* at 18. Plaintiff attaches responses to interrogatories  
5 from defendants Helling and Skolnik, and the NDOC. *Id.* at 48, 64, 68. However, the evidence  
6 plaintiff attaches fails to raise a triable issue of material fact as to plaintiff's claims in the operative  
7 complaint.

8 The court notes that the plaintiff is proceeding *pro se*. “In civil rights cases where the  
9 plaintiff appears *pro se*, the court must construe the pleadings liberally and must afford plaintiff the  
10 benefit of any doubt.” *Karim-Panahi v. Los Angeles Police Dep’t*, 839 F.2d 621, 623 (9th Cir.  
11 1988); *see also Haines v. Kerner*, 404 U.S. 519, 520-21 (1972).

## II. DISCUSSION & ANALYSIS

13 | A. Discussion

## 1. Summary Judgment Standard

15 Summary judgment allows courts to avoid unnecessary trials where no material factual  
16 disputes exist. *Nw. Motorcycle Ass'n v. U.S. Dep't of Agric.*, 18 F.3d 1468, 1471 (9th Cir. 1994).  
17 The court grants summary judgment if no genuine issues of material fact remain in dispute and the  
18 moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). The court must view  
19 all evidence and any inferences arising from the evidence in the light most favorable to the  
20 nonmoving party. *Bagdadi v. Nazar*, 84 F.3d 1194, 1197 (9th Cir. 1996). However, the Supreme  
21 Court has noted:

22 [W]e must distinguish between evidence of disputed facts and disputed  
23 matters of professional judgment. In respect to the latter, our inferences must  
accord deference to the views of prison authorities. Unless a prisoner can  
point to sufficient evidence regarding such issues of judgment to allow him

1 to prevail on the merits, he cannot prevail at the summary judgment stage.  
 2 *Beard v. Banks*, 548 U.S. 521, 530 (2006). Where reasonable minds could differ on the material  
 3 facts at issue, however, summary judgment should not be granted. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 251 (1986).

5 The moving party bears the burden of informing the court of the basis for its motion, and  
 6 submitting evidence which demonstrates the absence of any genuine issue of material fact.  
 7 *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). Once the moving party has met its burden,  
 8 the party opposing the motion may not rest upon mere allegations or denials in the pleadings, but  
 9 must set forth specific facts showing that there exists a genuine issue for trial. *Anderson*, 477 U.S.  
 10 at 248. Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery,  
 11 against a party who fails to make a showing sufficient to establish the existence of an element  
 12 essential to that party's case, and on which that party will bear the burden of proof at trial.  
 13 *Celotex*, 477 U.S. at 322-23.

14 **B. Analysis**

15 Plaintiff alleges that defendants violated his First and Fourteenth Amendment rights, and  
 16 his rights under federal law, when they failed to provide him with a sukkah booth and an outdoor  
 17 area on which to place the booth.

18 **1. First Amendment Free Exercise Clause**

19 “Convicted prisoners do not forfeit all constitutional protections by reason of their  
 20 conviction and confinement in prison.” *Bell v. Wolfish*, 441 U.S. 520, 545 (1979). However,  
 21 “lawful incarceration brings about the necessary withdrawal or limitation of many privileges and  
 22 rights.” *O'Lone v. Estate of Shabazz*, 482 U.S. 342, 348 (1987) (quoting *Price v. Johnston*, 334  
 23 U.S. 266, 285 (1948)). A prisoner’s right to free exercise of his or her religion is necessarily  
 24 limited by incarceration, and may be curtailed to achieve legitimate correctional goals or to  
 25 maintain prison security. *McElyea v. Babbitt*, 833 F.2d 196, 197 (9th Cir. 1987) (per curiam).  
 26 To implicate the Free Exercise Clause, a belief must be “sincerely held” and “rooted in religious  
 27 belief.” *See Shakur v. Schriro*, 514 F.3d 878, 885 (9th Cir. 2008) (holding that the sincerity test  
 28 set forth in *Malik v. Brown*, 16 F.3d 330, 333 (9th Cir. 1994), and *Callahan v. Woods*, 658 F.2d

1 679, 683 (9th Cir. 1981), determines the applicability of the Free Exercise Clause). Defendants  
2 do not contest plaintiff's sincerely held belief in using a sukkah booth during the Sukkot festival.

3        “When a prison regulation impinges on inmates’ constitutional rights, the regulation is  
4        valid if it is reasonably related to legitimate penological interests.” *Shakur*, 514 F.3d at 883-84  
5        (quoting *Turner v. Safley*, 482 U.S. 78, 89 (1987)). Under *Turner*, the court must balance four  
6        factors in determining whether a prison regulation is reasonably related to legitimate penological  
7        interests. “First, there must be a ‘valid, rational connection’ between the prison regulation and  
8        the legitimate governmental interest put forward to justify it.” *Turner*, 482 U.S. at 89. Second,  
9        the court must determine whether there are “alternative means of exercising the right that remain  
10       open to prison inmates.” *Id.* at 90. Third, the court must consider “the impact accommodation  
11       of the asserted constitutional right will have on guards and other inmates, and on the allocation  
12       of prison resources generally.” *Id.* Fourth, “the absence of ready alternatives is evidence of the  
13       reasonableness of a prison regulation.” LCC approved plaintiff’s request for a sukkah booth.  
14       Thus, the restriction at issue is LCC’s refusal to purchase a sukkah booth with prison funds.<sup>9</sup>  
15       Plaintiff cites to a case and argues that under the *Turner* factors, the inmate in that case had a right  
16       to a sukkah booth (#50, p. 9). However, the facts of that case are distinguishable because there  
17       prison officials denied an inmate’s request for a sukkah booth.<sup>10</sup>

18 The first *Turner* factor requires determining whether there is a legitimate penological  
19 interest that is rationally related to the disputed regulation. Defendants assert that the Supreme  
20 Court has stated that a prison is not financially responsible for financing an inmate's religious  
21 materials (#26, p. 9). *See Cruz v. Beto*, 405 U.S. 319, 323 (1972). The court agrees. It would be  
22 unreasonable to require a prison to provide materials for every religion and sect practiced in their  
23 prison. *Id.* While prison officials may not deny a prisoner religious material if someone offers

<sup>10</sup> Plaintiff cites to *Sisney v. Reisch*, 533 F.Supp. 2d 952 (D.S.D. 2008). The court notes that this case is not in the Ninth Circuit and is thus not persuasive authority.

1 to supply it, they are not required to purchase the material themselves. *Id.* Defendants' refusal  
 2 to incur the costs of purchasing a sukkah booth is rationally related to economic considerations,  
 3 which constitutes a legitimate penological interest and is supported by law.<sup>11</sup> This factor favors  
 4 the defendants.

5 The second *Turner* factor examines whether plaintiff has "alternative means by which he  
 6 can practice his religion" or is "denied all means of religious expression." *Shakur*, 514 F.3d at  
 7 886. Defendants assert that under AR 810, plaintiff has alternative means by which he can  
 8 practice his religion (#26, p. 12). Plaintiff may participate in fasts, attend Jewish services, pray,  
 9 observe holy days, study his religion, possess Jewish allowable personal religious property, and  
 10 make use of Jewish allowable group religious property during group worship (#26-1, Ex. E, pp.  
 11 64-65). Plaintiff claims that denial of a sukkah booth adversely affects aspects of his religious  
 12 practice; however, he does not argue that he is denied all means of religious expression (#50, p.  
 13 10). Moreover, defendants approved plaintiff's request for a sukkah booth. This factor favors  
 14 the defendants.

15 The third *Turner* factor considers the "impact accommodation of the asserted  
 16 constitutional right will have on guards and other inmates, and on the allocation of prison  
 17 resources generally." *Turner*, 482 U.S. at 90. In his affidavit, former NDOC Deputy Director  
 18 Don Helling states that NDOC does not purchase religious property for inmates of any faith group  
 19 (#26-1, Ex. C, p. 17). The court is aware that prison administration is an "inordinately difficult  
 20 undertaking that requires expertise, planning, and the commitment of resources, all of which are  
 21 peculiarly within the province of the legislative and executive branches of government." *Resnick*  
 22 *v. Adams*, 348 F.3d 763, 770-71 (9th Cir. 2003). Because an exception for plaintiff would place  
 23 burdens on the prison with respect to prison resources, this factor weighs in favor of defendants.  
 24 See *Henderson v. Terhune*, 379 F.3d 709, 714 (9th Cir. 2004).<sup>12</sup>

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 26<sup>11</sup> The court also notes the practical challenges associated with a requirement that a prison  
 27 provide religious material to every religious sect in prison.

28<sup>12</sup> While not dispositive, the Ninth Circuit has taken into account the potential to create  
 29 prisoner unrest because of the appearance that certain groups of inmates were receiving preferential  
 treatment. See *Henderson*, 379 F.3d at 714.

1       The fourth *Turner* factors requires consideration of whether “there are ready alternatives  
 2 to the prison’s current policy that would accommodate [plaintiff] at de minimus cost to the  
 3 prison.” *Shakur*, 514 F.3d at 887. “[T]he absence of ready alternatives is evidence of the  
 4 reasonableness of a prison regulation,” *Washington v. Harper*, 494 U.S. 210, 225 (1990), while  
 5 the existence of alternatives may be “evidence that the [policy] is not reasonable but is an  
 6 ‘exaggerated response’ to prison concerns.” *Turner*, 482 U.S. at 90-91. Plaintiff maintains that  
 7 defendants should have sought another source for donating a sukkah booth or the materials to  
 8 build one (#50, p. 7). Defendants state that LCC never refused a donation of a sukkah booth from  
 9 the Aleph Institute or any other Jewish organization (#26-1, Ex. D, p. 22). Plaintiff does not  
 10 provide evidence that any other organization offered to donate a sukkah booth. Plaintiff’s  
 11 suggestion that LCC purchase the materials to build a sukkah booth would require them to spend  
 12 prison funds to purchase religious property and is thus not a ready alternative for the reasons  
 13 discussed above. Accordingly, this factor tips in favor of defendants.

14       Because plaintiff does not present an issue of material fact concerning the reasonableness  
 15 of the restriction or defendants’ refusal to provide him with use of the outdoor grounds, the court  
 16 recommends summary judgment be granted in favor of defendants on plaintiff’s First Amendment  
 17 claim.

18       **2.       RLUIPA**

19       Plaintiff brings his claim under RLUIPA, 42 U.S.C. § 2000cc *et seq.*, which provides in  
 20 relevant part:

21       No government shall impose a substantial burden on the religious exercise of a  
 22 person residing in or confined to an institution ... even if the burden results from  
 23 a rule of general applicability, unless the government demonstrates that  
 24 imposition of the burden on that person: (1) is in furtherance of a compelling  
 25 governmental interest; and (2) is the least restrictive means of furthering that  
 26 compelling governmental interest.

27       42 U.S.C. § 2000cc-1(a). “Religious exercise” is defined as “any exercise of religion, whether or  
 28 not compelled by, or central to, a system of religious belief.” 42 U.S.C. § 2000cc-5(7)(A). “A person  
 may assert a violation of [RLUIPA] as a claim or defense in a judicial proceeding and obtain  
 appropriate relief against a government.” 42 U.S.C. § 2000cc-2(a).

1        To establish a RLUIPA violation, the plaintiff bears the initial burden to prove that the  
 2 defendants' conduct places a "substantial burden" on his "religious exercise." *Warsoldier v.*  
 3 *Woodford*, 418 F.3d 989, 994 (9th Cir. 2005). Once the plaintiff establishes a substantial burden,  
 4 defendants must prove that the burden both furthers a compelling governmental interest and is the  
 5 least restrictive means of achieving that interest. *Id.* at 995. RLUIPA is to be construed broadly  
 6 in favor of the inmate. *See* 42 U.S.C. § 2000cc-3(g) ("This chapter shall be construed in favor of  
 7 a broad protection of religious exercise, to the maximum extent permitted by the terms of this  
 8 chapter and the Constitution").

9        Although RLUIPA does not define "substantial burden," the Ninth Circuit has stated that  
 10 a substantial burden is one that is "'oppressive' to a 'significantly great' extent" and "'a substantial  
 11 burden on 'religious exercise' must impose a significantly great restriction or onus upon such  
 12 exercise.'" *Warsoldier*, 418 F.3d at 995 (quoting *San Jose Christian Coll. v. City of Morgan Hill*,  
 13 360 F.3d 1024, 1034 (9th Cir. 2004)). The burden need not concern a religious practice that is  
 14 compelled by, or central to, a system of religious belief, *see* 2000cc-5(7)(A); however, the burden  
 15 must be more than an inconvenience. *Navajo Nation v. U.S. Forest Serv.*, 479 F.3d 1024, 1033 (9th  
 16 Cir. 2007), *aff'd en banc*, 535 F.3d 1058, 1068 (9th Cir. 2008) (internal quotations and citations  
 17 omitted). A burden is substantial under RLUIPA when the state, "denies [an important benefit]  
 18 because of conduct mandated by religious belief, thereby putting substantial pressure on an adherent  
 19 to modify his behavior and to violate his beliefs." *Shakur*, 514 F.3d at 888 (quoting *Thomas v.*  
 20 *Review Bd. of the Ind. Employment Sec. Div.*, 450 U.S. 707, 717-18 (1981) (internal quotations  
 21 omitted)).

22        Here, plaintiff alleges that defendants burdened his religious exercise by their refusal to  
 23 provide an outdoor area for use during the Sukkot festival, and to provide funds, donations, or  
 24 materials for a sukkah booth. As their first exhibit, defendants submit a declaration from LCC  
 25 Chaplain Richard Garcia as evidence that LCC approved plaintiff's request for a sukkah booth and  
 26 use of outdoor grounds, but had not successfully achieved the donation of a booth (#26-1, Ex. A).  
 27 Plaintiff does not dispute this fact (#1-2, pp. 19-20).

28        The burden is on plaintiff to establish any fact as to how defendants have placed a

1 substantial burden on his religious exercise. While plaintiff argues that defendants substantially  
 2 burdened his religious practice when they did not afford funds for the purchase of a sukkah booth,  
 3 the Supreme Court has stated that “RLUIPA does not require a State to pay for an inmate’s  
 4 devotional accessories.” *See Cutter v. Wilkinson*, 544 U.S. 709, 720 n.8 (2005). Plaintiff only  
 5 makes conclusory statements that defendants hindered the arrival of a sukkah booth (#50, p. 14).  
 6 Further, defendants did not deny plaintiff use of outdoor grounds, but only stated that they would  
 7 determine where to place the sukkah booth once it arrived (#1-2, p. 21).

8 Plaintiff fails to carry his burden under RLUIPA in showing that LCC’s decision not to  
 9 purchase a sukkah booth constitutes a substantial burden on the exercise of his religious beliefs.  
 10 In fact, plaintiff submits responses from LCC to plaintiff’s inmate request forms authorizing  
 11 plaintiff to obtain and use a sukkah booth and use the outdoor grounds during the Sukkot festival  
 12 (#1-2, pp. 19-21). Defendants did not impose a “significantly great restriction or onus upon such  
 13 exercise.” *Warsoldier*, 418 F.3d at 995 (quoting *San Jose Christian Coll. v. City of Morgan Hill*,  
 14 360 F.3d 1024, 1034 (9th Cir. 2004)). Although defendants did not purchase a sukkah booth for  
 15 plaintiff, they did not prevent the donation of a sukkah booth or prevent plaintiff from obtaining  
 16 one. Without a demonstration of a substantial burden or that defendants were required to purchase  
 17 a sukkah booth, the court need not apply the strict scrutiny test. Therefore, the court recommends  
 18 that summary judgment be granted on plaintiff’s RLUIPA claim as there are no triable issues of  
 19 material fact.<sup>13</sup>

20 **3. Requirement of Personal Participation**

21 While the court recommends defendants’ motion for summary judgment be granted,  
 22 defendant Skolnik is also entitled to summary judgment because he did not personally participate  
 23 in the alleged violations. “Liability under [§] 1983 arises only upon a showing of personal  
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25 <sup>13</sup> Defendants are also entitled to summary judgment on plaintiff’s RLUIPA claim for monetary  
 26 damages because plaintiff cannot recover monetary damages against defendants sued in their individual or  
 27 official capacities. *See Mauwee v. Donat*, 2009 WL 3062787, at \*6 (D.Nev. Sept. 18, 2009) (citing  
 28 *Rendelman v. Rouse*, 569 F.3d 182, 184 (4th Cir. 2009); *see also Holley v. Cal. Dep’t of Corrections*, 599  
 F.3d 1108, 1112 (9th Cir. 2010) (holding that a plaintiff cannot maintain a claim under RLUIPA against  
 defendants in their official capacities for monetary damages)).

1 participation by the defendant. A supervisor is only liable for the constitutional violations of . . .  
 2 subordinates if the supervisor participated in or directed the violations, or knew of the violations  
 3 and failed to act to prevent them. There is no respondeat superior under [§] 1983.” *Taylor v. List*,  
 4 880 F. 2d 1040, 1045 (9th Cir. 1989) (citations omitted); *see also Ashcroft v. Iqbal*, 557 U.S. 662  
 5 (2009); *Ortez v. Washington Cnty., State of Or.*, 88 F.3d 804, 809 (9th Cir. 1996) (concluding it is  
 6 proper to dismiss where there are no allegations of knowledge of or participation in an alleged  
 7 violation).

8 Plaintiff sues former NDOC Director Howard Skolnik for violations under the Free Exercise  
 9 Clause, RLUIPA, and the Equal Protection Clause (#1-2). Defendants move this court to grant  
 10 summary judgment with regard to plaintiff’s claims against defendant Skolnik under the First  
 11 Amendment and RLUIPA, and argue that he did not personally participate in or direct the alleged  
 12 violations (#26, p. 17). They further assert that defendant Skolnik did not know of any alleged  
 13 violations and fail to prevent them. *Id.* Defendant Skolnik did not respond to any of plaintiff’s  
 14 relevant grievances or kites (#1-2, pp. 19-29). Plaintiff argues that defendant Skolnik was the  
 15 primary policy maker and that these policies (AR 810) were the basis for denial of a sukkah booth  
 16 (#50, p. 18). However, because LCC approved plaintiff’s request for a sukkah booth, plaintiff  
 17 cannot prove that defendant Skolnik implemented a policy “so deficient that the policy is a  
 18 repudiation of constitutional rights” and is “the moving force of the constitutional violation.”  
 19 *Hansen v. Black*, 885 F.2d 642, 646 (9th Cir. 1989); *Taylor*, 880 F.2d at 1045. The court  
 20 recommends defendant Skolnik be entitled to summary judgment as to plaintiff’s First Amendment  
 21 and RLUIPA claims due to his lack of personal participation in the alleged violations.

22 **4. Fourteenth Amendment Equal Protection Clause**

23 The Equal Protection Clause requires the State to treat all similarly situated people equally.  
 24 *See City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 439 (1985). Each prisoner is entitled  
 25 to a “reasonable opportunity of pursuing his faith comparable to the opportunity afforded fellow  
 26 prisoners who adhere to conventional religious precepts.” *Cruz*, 405 U.S. at 322. In the prison  
 27 context, however, even fundamental rights such as the right to equal protection are judged by a  
 28 standard of reasonableness – specifically, whether the actions of prison officials are “reasonably

1 related to legitimate penological interests.” *Walker v. Gomez*, 370 F.3d 969, 974 (9th Cir. 2004)  
 2 (quoting *Turner*, 482 U.S. at 89). To establish a violation of the Equal Protection Clause, the  
 3 prisoner must present evidence of discriminatory intent. *See Washington v. Davis*, 426 U.S. 229,  
 4 239-40 (1976).

5 Plaintiff alleges two equal protection violations: 1) that defendants violated his rights as a  
 6 Jewish inmate because LCC does not have specifically designated “Jewish outdoor grounds” but  
 7 Native American and Pagan religions in the NDOC are allotted outdoor religious grounds; and 2)  
 8 that defendants and their agents made expenditures for other non-Jewish prisoners for religious  
 9 activity, but failed to do so for plaintiff’s request for a sukkah booth.

10       a.     **Jewish Outdoor Grounds**

11       NDOC AR 810 provides that “earth-based” religions such as Native American and Pagan  
 12 groups may have access to outdoor religious grounds (AR 810.4; #26-1, Ex. E, p. 35). AR 810  
 13 classifies the Jewish faith as a “chapel-based” religion because it is a group that traditionally uses  
 14 a building for worship. *Id.* Plaintiff claims this classification is unconstitutional because it affords  
 15 Native Americans and Pagan groups the opportunity to use the outdoor grounds (#1-2, p. 13).  
 16 Defendants contend that plaintiff is not similarly situated to inmates who practice religions that  
 17 historically meet outdoors (#26, p. 19). Further, defendants argue the differing treatment of  
 18 religions does not stem from discriminatory intent, but rather from an effort to accommodate  
 19 inmates of differing religious backgrounds. *Id.* Lastly, defendants assert that plaintiff offers no  
 20 evidence to support his claim that defendants failed to make a reasonable accommodation for the  
 21 purposes of discriminating against him on the basis of his religious beliefs.

22       The court agrees with defendants. Plaintiff does not present evidence that defendants  
 23 intentionally discriminated against plaintiff in the exercise of his religious beliefs based on his race  
 24 or religion. The only evidence plaintiff offers of such alleged discriminatory intent is his  
 25 observation that defendants allow different religious groups to engage in different practices. In  
 26 *Cruz v. Beto*, the Supreme Court stated that every religious sect or group within a prison need not  
 27 have identical facilities or personnel. 405 U.S. at 322 n.2. Simply alleging differing classifications  
 28 does not evidence discriminatory intent as defendants are only required to ensure that members of

1 different faith groups receive equal opportunity to pursue their faith, not equal or identical practices.  
 2 Despite the classification in AR 810.4, LCC approved plaintiff's request for a sukkah booth and for  
 3 use of the outdoor grounds.<sup>14</sup> Plaintiff submits no evidence that defendants acted without a  
 4 legitimate purpose or with discriminatory intent.

5 **b. Expenditures for Non-Jewish Inmates**

6 According to defendants' affidavits, LCC does not purchase religious property for inmates  
 7 of any faith group (#26-1, Ex. A, p. 1; Ex. C, p. 17). Plaintiff's conclusory allegations in his  
 8 complaint that defendants made expenditures for other non-Jewish prisoners for religious activity  
 9 are unsupported by evidence. Plaintiff states in his opposition that due to a "lack of understanding  
 10 of how to proceed with this issue, and an inability to get appropriate affidavits, the plaintiff will not  
 11 pursue this issue" (#50, p. 20). Because defendants offer evidence that they did not make  
 12 expenditures for religious property for non-Jewish inmates and plaintiff fails to offer evidence to  
 13 the contrary, the court recommends summary judgment be granted on this claim as there is no  
 14 triable issue of material fact.

15 Therefore, the court recommends that summary judgment be granted on plaintiff's Equal  
 16 Protection claims as plaintiff does not submit evidence demonstrating intentional discrimination  
 17 or discriminatory intent by defendants.<sup>15</sup>

18 **III. CONCLUSION**

19 Based on the foregoing and for good cause appearing, the court recommends that  
 20 defendants' motion for summary judgment (#26) on plaintiff's remaining claims under the First and  
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24 <sup>14</sup> The court's previous analysis under the First Amendment demonstrates that defendants had  
 25 a penological interest in declining to purchase the sukkah booth, and did not discriminate against plaintiff  
 26 based on his religion. Further, the court's analysis under RLUIPA demonstrates that defendants afforded  
 27 plaintiff a "reasonable opportunity of pursuing his faith" by approving his request for a sukkah booth and  
 28 his request to use the outdoor grounds. *See Cruz*, 405 U.S. at 322.

25 <sup>15</sup> Pursuant to the Eleventh Amendment, defendants are also entitled to summary judgment on  
 26 plaintiff's First and Fourteenth Amendment claims for monetary damages against defendants in their official  
 27 capacities. *See Will v. Michigan Dept. of State Police*, 491 U.S. 58, 71 (1989).

1 Fourteenth Amendments, and under RLUIPA be **GRANTED**.<sup>16</sup> The court also recommends that  
2 defendants' motion for summary judgment (#26) as to defendant Skolnik be **GRANTED** due to his  
3 lack of personal participation in the alleged violations. The parties are advised:

4 1. Pursuant to 28 U.S.C. § 636(b)(1)(c) and Rule IB 3-2 of the Local Rules of Practice,  
5 the parties may file specific written objections to this Report and Recommendation within fourteen  
6 days of receipt. These objections should be entitled "Objections to Magistrate Judge's Report and  
7 Recommendation" and should be accompanied by points and authorities for consideration by the  
8 District Court.

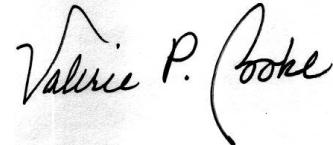
9 2. This Report and Recommendation is not an appealable order and any notice of  
10 appeal pursuant to Fed. R. App. P. 4(a)(1) should not be filed until entry of the District Court's  
11 judgment.

12 **IV. RECOMMENDATION**

13 **IT IS THEREFORE RECOMMENDED** that defendants' motion for summary judgment  
14 (#26) be **GRANTED** as to plaintiff's First and Fourteenth Amendment claims and RLUIPA claim.

15 **IT IS FURTHER RECOMMENDED** that defendants' motion for summary judgment  
16 (#26) as to plaintiff's First Amendment and RLUIPA claims against defendant Skolnik be  
17 **GRANTED**.

18 **DATED:** February 7, 2012.



19  
20 **UNITED STATES MAGISTRATE JUDGE**  
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28 <sup>16</sup> Because plaintiff has not demonstrated that defendants violated his rights, the court need not  
reach issues of qualified immunity.